IN THE UTAH COURT OF APPEALS

STEVEN J. ONYSKO, an individual, Petitioner; v. UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY, and UTAH CAREER SERVICE REVIEW OFFICE, Respondents.	REPLY BRIEF OF PETITIONER STEVEN ONYSKO Case No. 20180984-CA Agency Decision No. 2010 CSRO/HO 147

Appeal from the State of Utah Career Service Review Office, Salt Lake County Hearing Officer Geoffrey Leonard

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Oral Argument Requested

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I. The Hearing Officer's express use of an improper propensity inference was not a credibility determination.

DEQ argues the Hearing Officer did not make an improper propensity inference based on Dr. Onysko's conduct at the Hearing but rather assessed Dr. Onysko's credibility as a witness and the credibility of other witnesses. *See* Response, 27 ("[A] fact-finder may always consider a witness' demeanor[.]") (citation omitted). But in making this argument, DEQ ignores several of the Hearing Officer's express findings.[2]

Assessing the credibility of testifying witnesses is not the same as making an improper propensity inference. A credibility assessment refers to a factfinder's discretion in choosing whether to believe a witness's testimony. *See, e.g.*, *Hale v. Big H Const., Inc.*, 2012 UT App 283, ¶¶ 15-16, 35, 288 P.3d 1046 (explaining a factfinder may assess credibility and veracity to determine what weight, if any, to place on each witness's testimony).[3] Conversely, an improper propensity inference occurs when a factfinder

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[1] Dr. Onysko adopts the short names used in his March 28, 2019 principal brief (the "Brief") and will refer to DEQ's April 29, 2019 response brief as the "Response."

[2] Based on its failure to contest the issue, it seems DEQ agrees a propensity inference is generally improper in this context. *See* Response, 26-28 (DEQ not addressing the propriety of the propensity inference forbidden by the authority in the Brief).

[3] While Dr. Onysko does not dispute that the Hearing Officer was entitled to assess the credibility witnesses who testified, Dr. Onysko never testified during the Hearing. R. 4510. DEQ has not provided any argument or authority to support its position that a fact finder may assess credibility based on non-testimonial conduct. *See* Utah R. App. P. 24(a)(8) (requiring an explanation of why a party should prevail "with reasoned analysis supported by citations to legal authority and the record"). Also, even if the Hearing Officer could assess credibility based on non-testimonial conduct, such assessment would

infers that, because a party committed a certain act at one time, it is likely that such party committed the same act at a different time. *See* Brief, 19.

As the plain language of the CSRO Decision reflects, the Hearing Officer found that, because Dr. Onysko supposedly acted hostile and contentious during the Hearing, it was more likely he acted hostile and contentious while employed at DEQ. Specifically, the Hearing Officer stated: "If Grievant habitually indulged in such conduct in a formal proceeding intended to determine whether or not he returns to work for Agency, it is likely that he did no less in his everyday work environment." R. 4528.[4] This finding does not refer to or otherwise involve the credibility of testimony. In fact, the CSRO Decision never made any finding about Dr. Onysko's credibility. R. 4499-540.

Said another way, the Hearing Officer relied on Dr. Onysko's conduct at the Hearing to find Dr. Onysko had a character trait of acting hostile and contentious. *See* R. 4528 ("Grievant's conduct throughout this proceeding demonstrates that his preferred method to address a difference of opinion is to threaten, intimidate, belittle, and otherwise attack the other party."). Then, the Hearing Officer concluded that, because Dr. Onysko had a character trait of acting hostile and contentious, Dr. Onysko must have acted in

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have to take into account that Dr. Onysko was undergoing cognition-impairing cancer radiation therapy at the time of the Hearing. *See* Brief, 14 n.14; *see also, e.g.*, R. 4567 at 1417 (Dr. Onysko informing the Hearing Officer that he was not feeling well and probably not thinking clearly).

[4] The legal impropriety of this finding notwithstanding, such finding is also very likely false because Dr. Onysko was not undergoing cognition-impairing cancer radiation therapy until after termination.

conformance with that character trait during his earlier employment. *See id.* ("If Grievant habitually indulged in such conduct in a formal proceeding intended to determine whether or not he returns to work for Agency, it is likely that he did no less in his everyday work environment."). This is the very propensity inference forbidden by the authority cited in Dr. Onysko's Brief. *See* Brief, 19-20.[5]

But the Hearing Officer went even further by using his improper propensity inference to "corroborate" the testimony of DEQ's other witnesses. In particular, the Hearing Officer implicitly determined that, because Dr. Onysko had a character trait of acting hostile and contentious, and because Dr. Onysko must have acted in conformance with that character trait while employed, DEQ's witnesses must be telling the truth when they said Dr. Onysko acted hostile and contentious while employed at DEQ. *See* R. 4525, 4528 (stating "Grievant's conduct throughout this proceeding also tends to corroborate the testimony of Agency's witnesses and supports Agency's assessment of Grievant's conduct and its effect on Agency" and "Grievant's conduct in the hearing thus tends to corroborate the testimony of Agency witnesses as to the disruptive, morale breaking, and intimidating nature of Grievant's conduct").

[5] *See also* *Palmer v. St. George City Council*, 2018 UT App 94, ¶ 14 n.5, 427 P.3d 423 ("[D]espite the flexibility of administrative hearings, there remains the necessity of preserving fundamental requirements of procedural fairness in administrative hearings.") (citation omitted); *Salt Lake City Corp. v. Gallegos*, 2016 UT App 122, ¶ 21, 377 P.3d 185 (explaining the evidence in administrative hearings "must be legally relevant, in that it has some probative weight and reliability") (citation omitted).

Taken together, these findings show that the Hearing Officer was focused on Dr. Onysko's conduct at the Hearing, as opposed to what actually happened when Dr. Onysko was employed at DEQ. *See* Brief, 20 ("One of the trial judge's duties is to regulate the admission of character evidence so as to exclude evidence which tends to distract the trier of fact from the main question of what actually happened on a particular occasion.") (citation omitted). Where the Hearing Officer relied on this improper propensity inference to evaluate DEQ's entire body of evidence and devoted several pages to it in the CSRO Decision, there is a reasonable likelihood that this error affected the outcome of the Hearing. *See* Brief, 21-22, 36 (explaining that, under Utah Code Ann. § 63G-4-403(4), a person is substantially prejudiced by an error if there is a "reasonable likelihood that the error affected the outcome of the proceedings" or if the error played "a significant role" in the agency decision) (citations omitted).

Therefore, this Court should overturn the CSRO Decision because Dr. Onysko suffered substantial prejudice from the Hearing Officer's improper propensity inference.

II. The limited pre-termination notice Dr. Onysko received did not comply with R. 477-11-2, and the post termination process Dr. Onysko received cannot make up for such failure.

DEQ argues that Dr. Onysko received adequate pre-termination notice and, even if he did not, such failure was rectified by a "full and robust" post-termination process. *See* Response, 28-37. But DEQ ignores R. 477-11-2 in making its pre-termination argument and cites no authority to support it post-termination argument.

There is no dispute that, independent of the minimum requirements of due process, Dr. Onysko was statutorily entitled to ***written*** notification of the ***specific*** reasons for his proposed termination and time to respond ***before*** that discipline was imposed. *See* Brief, 23 (discussing Utah Admin. Code R. 477-11-2(2)(a)-(b); *see also* Utah Code Ann. § 63G-3-202 (explaining that administrative rules have the effect of law); *K.Y. v. Div. of Child & Family Servs.*, 2010 UT App 335, ¶ 19, 244 P.3d 399 (same).[6] Accordingly, DEQ's reliance on cases like *Hugoe v. Woods Cross City*[7] and *Larsen v. Davis County*[8] is misplaced because such cases do not interpret the specific written notice requirements of R. 477-11-2. *See* Response, 28-31.[9]

Additionally, *Hugoe* involved a municipal employee's appeal pursuant to Utah Code Ann. § 10-3-1106 based on city procedures, and *Larsen* involved a county employee's appeal pursuant to Utah Code Ann. § 17-33-4 based on county procedures. *See* Utah Code Ann. § 10-3-1106(6)-(7) (defining what issues are subject to judicial review and explaining that each municipalities' ordinances determine the earlier procedures); Utah Code Ann. § 17-33-4 (defining what issues are subject to judicial

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[6] DEQ argues Dr. Onysko was not entitled to written notice that one of the reasons for his termination was morale/productivity improvement after he left DEQ because such reason was a proper consideration under R. 477-11-3. *See* Response, 36-37. But this argument misses the point. Dr. Onysko was entitled to written and specific notice of each reason for his proposed termination, even if one assumes such reasons were otherwise proper.
[7] 2013 UT App 278, 316 P.3d 979.
[8] 2014 UT App 74, 324 P.3d 641.
[9] Similarly, DEQ's reliance on Dr. Onysko's meeting with Mr. Matheson is inapposite because the meeting did not provide written notice. *See* Response, 32-33; Brief, 24.

review and establishing county procedures prior to such review); *Hugoe*, 2013 UT App 278, ¶ 6; *Larsen*, 2014 UT App 74, ¶ 9. Ergo, the review in both cases was focused on the minimum constitutional due process protections afforded to city and county employees, as opposed to higher protections applicable to Utah state employees (like Dr. Onysko) via Utah Admin. Code R. 477-1-1 *et seq.* and Utah Code Ann. § 63G-4-403.

The proper inquiry, then, is whether Dr. Onysko suffered substantial prejudice from DEQ's failure to provide him with the pre-termination notice required by R. 477-11-2 and/or suffered substantial prejudice from the Hearing Officer's reliance on reasons for which Dr. Onysko received no pre-termination notice. *See* Utah Code Ann. § 63G-4-403(4) (explaining the court shall grant relief if the petitioner was substantially prejudiced by, among other things, the agency's failure to follow proscribed procedure or the agency's erroneous application of the law); *R.O.A. Gen., Inc. v. Utah Dep't of Transp., Dist. Three*, 966 P.2d 840, 842 (Utah 1998) (requiring an agency to "follow its own rules").

In this case, the Hearing Officer unquestionably relied on the eight New Reasons[10] to affirm Dr. Onysko's termination. *See* Brief, 14-15, 24-28.[11] There is also no dispute that Dr. Onysko did not receive specific and written notice that DEQ was considering his termination based on several of the New Reasons until after the termination occurred. *See id.* DEQ's failure to follow its own rules in this regard substantially prejudiced Dr. Onysko because, if Dr. Onysko had the chance to offer his multiple defenses to all the reasons DEQ was considering (i.e., the significant amount of evidence in the record that Dr. Onysko attempted to present at the Hearing on each of DEQ's allegations), then DEQ might have altered its termination decision. *See* Brief, 28.

DEQ argues the Intent to Dismiss Letter is "clear" because, among other things, it referenced "the findings of the DHRM Investigation Report," "threats to file a police

[10] These reasons include: (1) Dr. Onysko's purported conduct during the Hearing itself; (2) Dr. Onysko supposedly delivered a copy of his abusive conduct complaint and GRAMA requests to Ms. Macauley; (3) Dr. Onysko allegedly did not follow the six specific directions listed in the 2016 Warning; (4) Dr. Onysko's written comments in his 2016 Evaluation purportedly caused Ms. Macauley intimidation, humiliation, or unwarranted distress; (5) the fifth, sixth, and seventh allegations in the Investigation Report supposedly corroborated Dr. Onysko's misbehavior; (6) Dr. Onysko allegedly entered co-workers' project files needlessly; (7) Dr. Onysko purportedly told Michelle Watts "that he was going to file a criminal complaint regarding the manner in which the [Intent to Reprimand Letter] had been delivered to him;" and (8) productivity and morale supposedly improved after Dr. Onysko left DEQ. *See* Brief, 14-15.

[11] Many of DEQ's statements about the facts on which the Hearing Officer relied are verifiably false. For example, DEQ asserts the CSRO did not uphold Onysko's termination based on the fifth, sixth, and seventh findings in the Investigation Report. *See* Response, 36. Yet, the Hearing Officer expressly acknowledged that he "considers the conduct described in allegations (v) through (vii) as . . . corroboration of other evidence of Grievant's conduct." R. 4523. If such corroboration did not exist, there is a reasonable likelihood the Hearing Officer would have made a different decision.

report," and "threats to his supervisor over the performance evaluation." Response, 31. But, as explained in the Brief, these vague references are not the specific notice required by R. 477-11-2. For example, the Intent to Dismiss Letter does not: (1) include a copy of Investigation Report, disclose the nature of the seven allegations therein, or disclose the conclusions for each of those allegations; (2) identify who was involved in the "police report" threat, when such threat took place, or provide any meaningful detail of the incident; or (3) identify who was involved in the "performance evaluation" threat, when such threat took place, or provide any meaningful detail of the incident.

As an alternative argument, DEQ suggests "that even if more pre-termination notice were required, any alleged deficiencies were more than rectified by the full and robust post-termination process that Onysko received." Response, 33. However, DEQ does not cite any authority for this position, so this Court should reject it as inadequately briefed. *See* Utah R. App. P. 24(a)(8) (requiring an explanation of why a party should prevail "with reasoned analysis supported by citations to legal authority and the record"). Moreover, Dr. Onysko has already explained that the occurrence of a full post-termination hearing does not negate the requirement of adequate pre-termination notice of all the employer's allegations, including an explanation of the employer's evidence, and a pre-termination opportunity to respond. *See* Brief, 30.

In sum, this Court should overturn the CRSO Decision because Dr. Onysko suffered substantial prejudice from the lack of specific and written pre-termination notice under R. 477-11-2.

III. DEQ's citations do not provide a proper non-hearsay basis for the Hearing Officer's eight Hearsay Findings.

DEQ argues that the eight Hearsay Findings are, in fact, not hearsay but were rather supported by the testimony of Ms. Owens, Mr. Clark, Ms. Macauley, and Mr. Laughlin. *See* Response, 21-25. DEQ is incorrect.

DEQ does not challenge Dr. Onysko's assertion that a CSRO hearing officer is precluded from making findings based on testimony by persons acting as a conduit for the personal knowledge of others. *See* Response, 21-25 (not addressing Dr. Onysko's hearsay authority). Thus, the remaining issue is whether the eight Hearsay Findings are based solely on inadmissible hearsay.

First, DEQ argues the Hearing Officer's statement regarding Mr. Lunstad[12] was not a true finding because it is not located in the "Findings of Fact" section and the Hearing Officer said he did not consider Mr. Lunstad's ***email***. *See* Response, 21. But how the statement about Mr. Lunstad was labeled does not determine whether it is actually a finding. *See In re Discipline of Jardine*, 2015 UT 51, ¶ 23, 353 P.3d 154 ("The mere fact that language in the court's 'findings' section also contains mixed

[12] *See* Brief, 31-32 (discussing the Hearing Officer's finding that Mr. Lunstad "expressed concern that [Dr. Onysko] might retaliate against him for his participation in [the creation of the Investigation Report]").

determinations . . . is of no consequence because . . . '[t]he labels attached to findings of fact or conclusions of law are not determinative.'") (citation omitted). Also, Dr. Onysko is not challenging the Hearing Officer's reliance on Mr. Lunstad's ***email***, but rather his reliance on Mr. Lunstad's ***statement*** in the Investigative Report. *See* R. 4501 n.4. ("*See also* Hearing Exhibit A10, Investigative Report, pp. 3-4, where Mr. Lunstad is recorded as expressing concern that Grievant might retaliate against him for his participation in that investigation.").

Second, DEQ argues the Hearing Officer's findings regarding the subjective feelings of multiple co-workers and customers and Dr. Onysko's history of filing complaints for improper reasons[13] are not hearsay because they are based on the testimony of Ms. Owens, Mr. Clark, Ms. Macauley, and Mr. Loughlin. *See* Response, 21-24.[14] But DEQ's record citations do not reflect personal knowledge of how those

[13] *See* Brief, 32-35 (discussing the Hearing Officer's findings that: (1) "two [DEQ] customers" and "several staff members" complained; (2) "[o]ther [DEQ] engineers were 'on guard' and regularly took extra time to over-document their work, resulting in a loss of DEQ productivity;" (3) Dr. Onysko's "[c]oworkers were concerned that they would be the next target of [Dr. Onysko's] allegations of unprofessional conduct or violation of the professional engineers' code of ethics;" (4) Dr. Onysko's "demeanor and conduct purportedly made it difficult for co-workers and customers to work collaboratively with him;" (5) DEQ "morale was low" because of Dr. Onysko); and (6) Dr. Onysko "had a history of filing, or threatening to file, actions against individuals with whom he disagreed or against their professional licenses.").

[14] DEQ incorrectly suggests that Dr. Onysko challenged the following finding on hearsay grounds: "how DDW and DEQ morale was low when Onysko was there, but improved in his absence." Response, 22. In fact, Dr. Onysko challenges this finding on notice grounds. *See* Brief 27-28.

co-workers and customers subjectively felt ***during*** Dr. Onysko's employment or about the ***propriety*** of Dr. Onysko's complaints.

Indeed: (1) page 621 of R. 4567 reflects Ms. Owens's testimony on changes after Dr. Onysko left DEQ (as opposed to how co-workers and customers felt while working with Dr. Onysko); (2) pages 437-38 of R. 4567 reflect Ms. Macauley's testimony on changes after Dr. Onysko left DEQ (as opposed to how co-workers and customers felt while working with Dr. Onysko); (3) page 1352 of R. 4567 reflects Mr. Clark's personal belief, as a supervisor, of Dr. Onysko's "[i]nability to get along" and the projects DEQ management would not assign to Dr. Onysko (as opposed to how co-workers and customers felt while working with Dr. Onysko); (4) pages 257-58 and 261 of R. 4567 reflect Ms. Macauley's testimony on why she thinks others were "on guard" and of what complaints she thinks others were aware (as opposed to testimony from persons who were actually on guard and testimony regarding the propriety of Dr. Onysko's complaints); (5) page 1241 of R. 4567 reflects Ms. Watts' testimony on a single potential complaint Dr. Onysko mentioned (as opposed to a history of improper complaints by Dr. Onysko); and (6) page 1869 of R. 4567 reflects Mr. Loughlin's testimony on his single grievance (as opposed to multiple complaints against Dr. Onysko). In short, none of this testimony provides non-hearsay support for the Hearing Officer's findings regarding the personal feelings of numerous co-workers and customers and the justification of Dr. Onysko's prior complaints.

Third, DEQ argues the Hearing Officer's finding that Dr. Onysko left copies of GRAMA requests on Ms. Macauley's desk[15] is not hearsay because it is based on Mr. Embley's testimony and Dr. Onysko's habit of delivering things directly to Macauley. *See* Response, 24-25. But the record actually shows the Hearing Officer relied exclusively on Mr. Embley's testimony about what Ms. Macauley supposedly told him, i.e., inadmissible hearsay. *See* Brief 32.[16] Also, it is improper to infer that because Dr. Onysko delivered something to Macauley once, he must have done so again. *See* Brief, 19-20.

In sum, this Court should overturn the CSRO Decision because Dr. Onysko suffered substantial prejudice from the Hearing Officer's exclusive reliance on inadmissible hearsay to make at least eight findings in support of such decision.

IV. With the improper reasons removed from consideration, Dr. Onysko's termination was not proportionate or consistent.

Based on its conclusory assertion that Dr. Onysko "engaged in prohibited abusive conduct," DEQ argues the Hearing Officer's proportionality and consistency decisions are not abuses of discretion. *See* Response, 38-43. But DEQ's argument in this regard wrongly assumes the validity of the Hearing Officer's underlying conclusions.

[15] *See* Brief, 32.

[16] Relying on Mr. Embley as a conduit in this context is especially inappropriate where, by the end of the Hearing, "Ms. Macauley could not remember whether or not a copy of the request was left on her desk." R. 4518.

Dr. Onysko already showed that, if the improper reasons[17] are removed from consideration consistent with *Burgess v. Dep't of Corr.*,[18] the only remaining reasons on which the Hearing Officer relied to justify Dr. Onysko's termination are the 2016 Warning and the Written Reprimand. *See* Brief, 36-37.[19] Because DEQ's attempted defenses of the improper reasons are without merit, Dr. Onysko's conclusion remains accurate. Consequently, because the 2016 Warning and the Written Reprimand are their own punishment and Dr. Onysko had an exemplary 20-year service record, termination was not proportional. *See* Brief, 36-37; *see also* *Harmon v. Ogden City Civil Serv. Comm'n*, 2007 UT App 336, ¶ 9, 171 P.3d 474.

DEQ defends the Hearing Officer's consistency determination by arguing Dr. Onysko's repetitive purported misconduct, i.e., receiving discipline twice and then having an abusive conduct complaint sustained, warranted termination and was consistent with

[17] Namely: (1) the improper propensity inference, (2) the ten termination reasons the Hearing Officer either expressly disregarded or did not address, (3) the eight New Reasons for which Dr. Onysko received no pre-termination notice, and (4) the eight Hearsay Findings based exclusively on inadmissible hearsay. *See* Brief, 36-37.
[18] 2017 UT App 186, 405 P.3d 937.
[19] DEQ claims Dr. Onysko "fails to explain why the 2017 Investigation Report cannot be considered." Response, 38. But this is inaccurate. Dr. Onysko explained "while [the Intent to Dismiss Letter] identifies the Investigation Report as one of the reasons [for Dr. Onysko's termination], the Intent to Dismiss Letter does not include or summarize that report" and "the Hearing Officer was limited to considering evidence respecting the reasons offered in the 'four corners' of DEQ's Intent to Dismiss Letter." *See* Brief, 11, 23 (citations omitted). Therefore, the Hearing Officer could not affirm Dr. Onysko's termination based on reasons identified in the Investigation Report, but not identified in the Intent to Dismiss Letter, such as the fifth, sixth, and seventh allegations in the Investigation Report. *See* Brief, 26.

other employees. *See* Response, 42-43. But DEQ ignores Employee 2 in making this argument. Employee 2 was allowed to retire in lieu of termination after engaging in unprofessional, argumentative, and rude conduct during a conference call with a customer and a supervisor, even though Employee 2 had already received a reprimand and a suspension. *See* Brief, 38. Dr. Onysko's history of a warning and a reprimand is less egregious then Employee 2's history of a reprimand and a suspension. Thus, DEQ's termination of Dr. Onysko for an alleged third round of misconduct is not consistent with DEQ allowing Employee 2 to retire after a third round of misconduct.[20]

In sum, this Court should overturn the CSRO Decision because Dr. Onysko suffered substantial prejudice from the Hearing Officer's erroneous determination that Dr. Onysko's termination was proportionate and consistent.[21]

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[20] Unfortunately, Dr. Onysko cannot provide further details regarding comparable employees because the Hearing Officer denied his multiple requests for additional information. R. 4142-60; 4567 at page 1419; *see also* *Palmer*, 2018 UT App 94, ¶ 41.

[21] DEQ criticizes Dr. Onysko for not marshaling to show that certain factual findings are not supported by substantial evidence. *See* Response, 20. But Dr. Onysko's challenges are primarily based on the Hearing Officer's erroneous application and interpretation of the law. *See* Brief, 3-6 (listing the issues raised); Utah Code Ann. § 63G-4-403(4) (listing lack of substantial evidence as only one of 11 separate grounds on which this Court may relief); *Wardley Better Homes & Gardens v. Cannon*, 2002 UT 99, ¶ 14, 61 P.3d 1009 ("Challenges to . . . legal determinations . . . do not require an appellant to marshal the evidence."). In any event, Dr. Onysko has marshalled as a natural extension of his burden of persuasion. *See* *State v. Nielsen*, 2014 UT 10, ¶¶ 40-41, 326 P.3d 645 (repudiating the focus "on whether there is a technical deficiency in marshaling" and stating the requirement to marshal is "a natural extension of an appellant's burden of persuasion."); Brief.

CONCLUSION

Based on the foregoing, this Court should overturn the CSRO Decision because Dr. Onysko was substantially prejudiced by the cumulative impact of the Hearing Officer's errors discussed above. Further, this Court should order Dr. Onysko's reinstatement with back pay, or, in the alternative, remand. *See* Utah Code Ann. § 63G-4-404(1)(b) (allowing this Court to "order agency action" and "modify agency action").

DATED: May 23, 2019.

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CERTIFICATE OF COMPLIANCE

Dr. Onysko certifies this brief complies with Utah R. App. P. 21 and 24(g).

DATED: May 23, 2019.

KESLER & RUST

/s/ J. Adam Knorr

_____

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be delivered two true and correct copies of the foregoing **REPLY BRIEF OF PETITIONER STEVEN ONYSKO**, by U.S. Mail on May 24, 2019 to:

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